

the 16 day of October 2003
TESTE: LILLIE M. HART, CLERK 10:15am
By rdm D.C.

VIRGINIA:

IN THE CIRCUIT COURT OF CITY OF CHESAPEAKE

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|--------------------------|---|---------------------------|
| COMMONWEALTH OF VIRGINIA |) | |
| |) | |
| v. |) | CRIMINAL NOS. CR 03-3089, |
| |) | CR 03-3090 & CR 03-3091 |
| |) | |
| LEE BOYD MALVO |) | |

**COMMONWEALTH'S MEMORANDUM OF LAW IN RESPONSE TO DEFENDANT'S
MOTION TO DISMISS INDICTMENT DUE TO ALLEGED
UNCONSTITUTIONALITY OF VIRGINIA CODE §18.2-31(31)**

The Defendant Malvo has moved to dismiss the indictment against him on the grounds that Virginia Code §18.2-31(13) (the Terrorism Statute) violates the first and eighth amendments of the United States Constitution.

Malvo asserts that the Terrorist Statute constitutes cruel and unusual punishment. Malvo concedes, as he must, that Virginia's death penalty is not itself cruel and unusual. Defendant's Memorandum of Law at p. 4. Nevertheless, Malvo insists that the death penalty as applied under the Terrorism Statute violates the Eighth Amendment. Malvo's reasons for this assertion will be addressed in turn.

I. THE TERRORISM STATUTE IS NOT UNCONSTITUTIONALLY VAGUE OR
OVERBROAD.

Malvo asserts that §18.2-31(13) is "devoid of clarity." He then offers as proof the fact that the Virginia Code never defines "Terrorism". Defendant's Memorandum at p.5. This is true, but the Virginia Code does define "Acts of terrorism." §19.2-297.1; Defendant's Memorandum at p. 3. Later in his brief, Malvo revisits this theme when he complains that certain phrases contained in Virginia Code §18.2-46.4 are also impermissibly vague. Defendant's

Memorandum at pp. 5-7. The terms which Malvo finds hopelessly unintelligible are “civilian population at large,” “conduct or activities,” and “locality.” There is nothing mysterious about these words, and the statute should be read in such a way so as to give reasonable effect to its language and promote the ability of the enactment to remedy the mischief at which it is directed. See generally, Johnson v. Commonwealth, 37 Va. App. 634, 639 (2002).

Malvo also argues that the statute is overbroad because it enhances the penalties for certain crimes by making possible a sentence of death for certain offenses previously not subject to that penalty. Malvo reasons that these changes clearly show that the legislature failed to even “remotely anticipate” that new legislation will result in new law. Defendant’s Memorandum at pp.4,6. Not surprisingly, Malvo can offer no case law in support of this novel and judicially repressive method of statutory construction. As a matter of law, courts presume that legislative amendments are intended to effect change in the law and are made with full knowledge of how the new law will effect the subject matter. See generally, Broadnax v. Commonwealth, 24 Va. App. 808, 814-815 (1997); Shaw v. Commonwealth, 9 Va. App. 331, 334 (1990).

II. THE ENHANCED PENALTIES FOR CRIMES COMMITTED WITH THE
CRIMINAL INTENT DEFINED AT VIRGINIA CODE SECTION §18.2-46.4 ARE
NEITHER EXCESSIVE NOR VIOLATIVE OF THE EQUAL PROTECTION
CLAUSE.

Malvo argues that the penalty of death for his crimes unfairly violates the Equal Protection Clause by punishing him more harshly than some other murderers. Malvo first recognizes that under the present statutory scheme in Virginia, “a crime may be capital or not, and even a more heinous crime may not be, depending solely on the actor’s motive.” Defendant’s Memorandum,

pp. 4-5, 9. Again, no case law is provided to support Malvo's reasoning that the legislature cannot consider the intent of the criminal when affixing the penalty for the crime. *Id.* at p.7. Malvo does not mention, let alone distinguish, other statutory schemes found in the Virginia Code which enhance penalties for crimes on the basis of the intent of the criminal. See, e.g. §18.2-47 et seq. (penalties enhanced for abduction where the intent of the abductor is pecuniary benefit or to defile).

Similarly, Malvo can provide no case law to support his proposition that it is excessive (and therefore cruel and unusual) to impose the death penalty on an accessory to murder. Defendant's Memorandum at pp. 7-8. In this instance, Malvo does acknowledge that the Virginia legislature has properly created statutory schemes for the imposition of the death penalty in cases involving defendants who are not the actual killers, noting specifically the penalties for those who solicit murder in murder for hire situations. But Malvo asks the Court to distinguish the offense of being an accessory to murder by solicitation from being an accessory to murder by committing or attempting to commit an act of terrorism. Malvo reasons that in the latter case the accessory is more deserving of leniency because he renders his assistance "based upon his or her political beliefs." *Id.* at p.8. The legislative scheme set forth in the Terrorism Statute makes it abundantly clear that the people's representatives view that particular reason to kill not only unsympathetically but with abhorrence.

III. KILLING HUMAN BEINGS IN ORDER TO EXPRESS "PERSONAL, POLITICAL, RELIGIOUS OR OTHER BELIEFS" OR TO "INFLUENCE THE GOVERNMENT OR INTIMIDATE THE PUBLIC" IS NOT A FORM OF CONSTITUTIONALLY

PROTECTED SPEECH AND THE TERRORISM STATUTE DOES NOT VIOLATE
THE FIRST AMENDMENT OF THE UNITED STATES CONSTITUTION.

On page 5 of the Defendant's Memorandum, Malvo declares that "imposing harsher penalties specifically upon those who act with an aim to influence or change the government, while not a direct restraint on free speech, certainly more than implicates ...the First Amendment." Later at page 8, Malvo restates his thesis that "[t]he unequal treatment of those similarly situated based purely on the intended symbolism of the offense is a borderline violation of the First Amendment..." But once again, no legal support is offered; only glib and misleading analogies to the revolutionary activities of our nation's founders. *Id.* at pp. 5,11-12.

The crux of Malvo's First Amendment complaint is that "otherwise protected anti-government notions held by the defendant are themselves punished by [Virginia's statutory] scheme." *Id.* at 5. This is incorrect. What is punished is the murderous activities of those who not only kill calculatedly and without remorse but who kill at least partly in order to terrorize those left alive. Under the Terrorism Statute, there is no cognizance of the government's friends or foes, no differentiation made for the killer who seeks to terrorize people into opposition to the government or into submission to it. Indeed, contrary to the tacit assumptions in Malvo's arguments, there is in fact no presumption in the Terrorism Statute that the motive of the terrorist will necessarily involve governmental policies at all. In the Terrorism Statute the legislature has carefully crafted a law to protect people, not opinions. The First Amendment simply has nothing to do with this statute.

CONCLUSION

Virginia Code §18.2-31(3) does not violate the First or Eighth Amendments of the United States Constitution, and the Defendant's Motion to Dismiss the Indictment should be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing Memorandum of Law was mailed and sent via facsimile to Michael Arif, Esq., Counsel for defendant, this 15th day of October 2003.

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